Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application of
TESSIM ZORACH and ESTA GLUCK,
Appellants,
for an order pursuant to Article 78 of the Civil Practice Act,
against
ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York, directing them to discontinue certain school practices,
and
THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS and ROMAN CATHOLICS,
Intervenor.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

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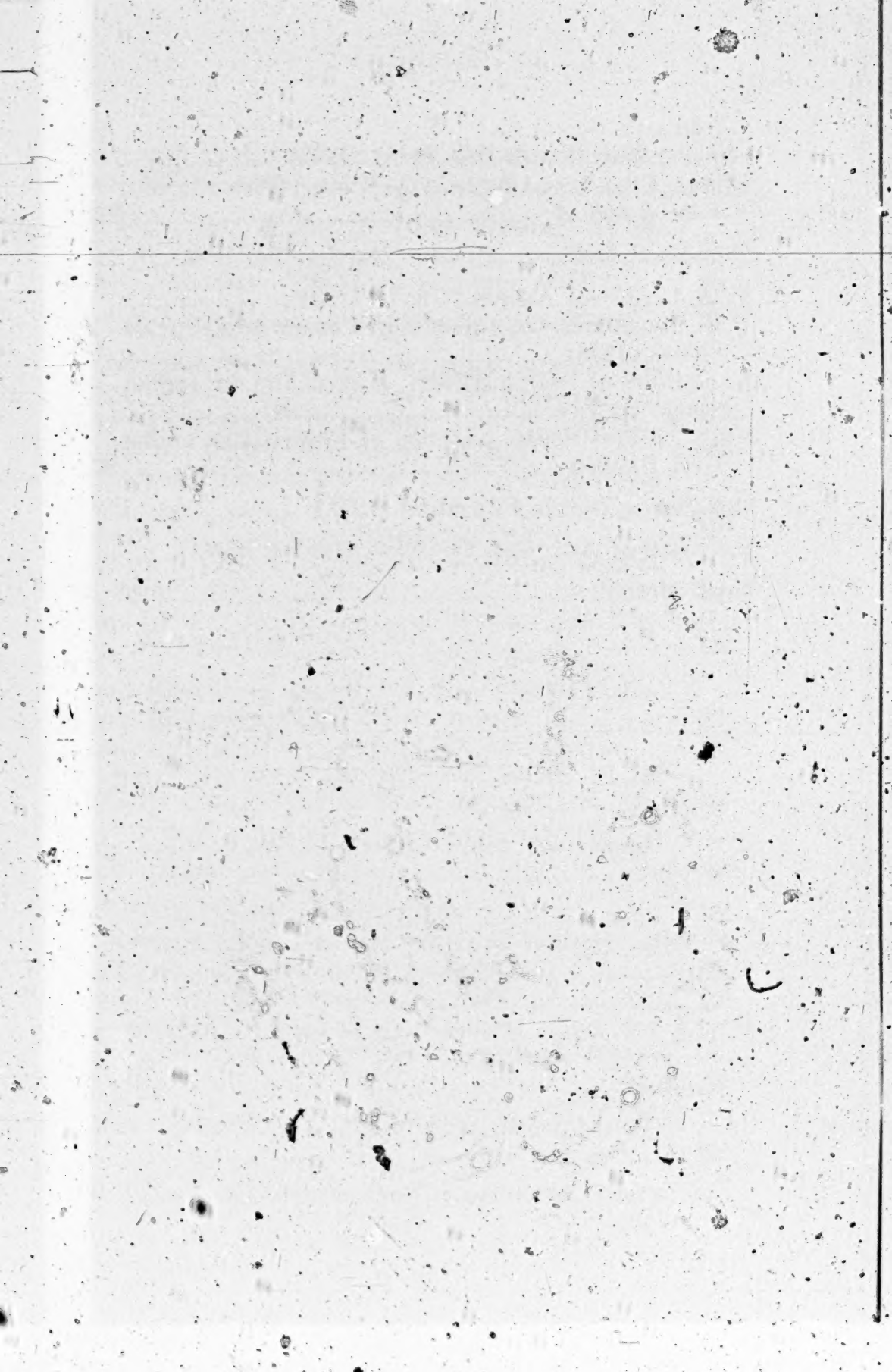

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Opinions Below

The opinion of the Court of Appeals of the State of New York, including the concurring and dissenting opinions (R. 114-141) is officially reported in 303 N. Y.

161; and in 100 N. E. (2d) 463. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, including dissenting opinion (R. 107-11), which was affirmed by the Court of Appeals, is officially reported in 278 App. Div. 573; and in 103 N. Y. S. (2d) 27. The opinion of Special Term, Supreme Court, State of New York, Kings County (R. 81-98), which was affirmed by said Appellate Division, is officially reported in 198 Misc. 631; and in 99 N. Y. S. (2d) 339. The opinion of said Special Term, on its denial of appellant's motion for reargument, is not officially reported, but is reported unofficially in 124 N. Y. Law Journal (August 23, 1950), col. 5, p. 299, and is printed at pages 70-71 in the "Statement as to Jurisdiction" herein as "Exhibit D".

Jurisdiction

The judgment and order of the Court of Appeals of New York (R. 142-3) were filed on July 11, 1951. The Order on Remittitur (R. 143-4) was filed in the Supreme Court, State of New York, Kings County on July 30, 1951. A petition for appeal (R. 145), an Assignment of Errors and Prayer for Reversal (R. 146-151) and a Jurisdictional Statement ("Statement as to Jurisdiction" herein) were submitted to the Chief Judge of the Court of Appeals of New York on September 19, 1951, and he signed an order allowing appeal and a citation on appeal (R. 145-6) on September 24, 1951. Said Papers on Appeal and Jurisdictional Statement were thereafter filed in this Court. On December 11, 1951, this Court made an order noting probable jurisdiction (R. 154).

The jurisdiction of this Court rests on 28 U. S. C. §1257(2).

The Statute, Regulations and Constitutional Provisions Involved

The statute involved is Section 3210 (1) b of the Education Law of the State of New York (Laws of New York 1940, Ch. 305; McKinney's Consolidated Laws of New York, Book 16, Part 1, Art. 65, Part 1, p. 761). The rules and regulations involved are those of the Commissioner of Education of the State of New York established July 4, 1940 (R. 15-6; 114-5; Regulations of Commissioner of Education, Art. 17, §154; 1 N. Y. Official Compilation of Codes, Rules and Regulations at p. 683); and the additional rules and regulations established by the Board of Education of the City of New York on November 13, 1940 (R. 16-18).

Section 3210 of the Education Law provides:

> "§3210. *Amount and character of required attendance.*
>
> 1. Regularity and conduct. (a) A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. (b) *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (Italics supplied.)

(Other provisions of the N. Y. Education Law, incidentally relevant herein, are printed in the Appendix below.)

The rules and regulations of the State Commissioner of Education, issued on July 4, 1940, provide (R. 15-6, 114-5):

> "1. Absence of a pupil from school during school hours for religious observance and education to be

had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools.

The rules and regulations of the Board of Education of the City of New York, established November 13, 1940, provide (R. 16-18, 115-6):

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the

public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Rule No. 4 of said rules and regulations of the Board of Education of the City of New York was amended on September 24, 1941 to provide as follows (R. 18):

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

The First and Fourteenth Amendments to the United States Constitution provide in part:

"I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

"XIV. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

(a) Nature of Appeal and Proceeding.

Appellants are appealing from a judgment and order of the Court of Appeals of the State of New York filed July 11, 1951 (R. 142-3) which affirmed, with costs, an order of the Appellate Division of the Supreme Court, Second Judicial Department, entered January 15, 1951 (R. 103-5), which said order, two Justices dissenting, affirmed a final order (R. 6-10) made by Mr. Justice DiGiovanna at Special Term, Part I, of the Supreme Court of the State of New York, Kings County, on June 23, 1950 which (1) denied appellants' motion (R. 73-8, 11-12) for an order directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers; (2) granted the cross motion of the intervenor (R. 79-80) for a final order dismissing the proceedings on the merits on the ground that the petition fails to state facts sufficient to constitute a cause of action; (3) sustained the objections (R. 26, 51) in the answers of the

respondents in point of law to the petition, to wit, that the petition fails to state facts sufficient to constitute a cause of action against them; and (4) denied the appellants' application in all respects and dismissed their petition on the merits as a matter of law.

This proceeding, in the nature of mandamus, was brought by appellants under and pursuant to Article 78, Sections 1283-1306 of the New York Civil Practice Act, which relates to "Proceedings Against a Body or Officer". The purpose of the proceeding, as appears from the demand for relief in the petition (R. 23), is to obtain an order against respondent Board of Education and respondent Commissioner of Education, directing them to discontinue the program of released time for religious education in practice in New York City and to rescind and abrogate the regulations promulgated by them respecting and authorizing such released time program, on the ground that such released time program, as authorized and as operated, is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

(b) The Petition and Other Pleadings and Accompanying Papers

Appellants' petition sets forth the following:

Appellants are United States citizens, taxpayers and property owners in Kings County, City and State of New York and appellants' children attend Public Schools Nos. 8 and 130 in Brooklyn, New York City (R. 13). The released time program in question is in operation there and in New York City public schools generally (R. 18). Neither of the appellants has sought to take advantage of the released time program. None of their children participates in the released time program but all regularly attend

Protestant Episcopal or Jewish schools for religious instruction at times other than the hours in which public schools are in session (R. 22). When other pupils in these schools are released to attend classes in religious instruction outside of the schools, they are required to remain in attendance at the public schools to continue secular studies and work thereat (R. 19-20).

In June 1948, each of the appellants demanded of respondents that they rescind their regulations and discontinue the released time program in the public schools of New York, including public schools numbered "8" and "130", but respondents failed and refused to do so (R. 22). The respondent Commissioner of Education as the chief executive officer of the New York State system of education, is charged with enforcement of laws relating to the educational system of the State, the execution of state educational policies and the general supervision of all schools subject to the provisions of the Education Law, including the public schools in New York City (R. 13-14). Respondent Board of Education has immediate supervision and control of the public school system of the City of New York and is obligated to perform any duty imposed by the State Education Law or by authorized regulations of the Commissioner of Education (R. 14).

Under Section 3212 of the New York State Compulsory Education Law, appellants are required to send their minor children to attend regularly upon instruction during the entire term the appropriate public schools are in session and failure to do subjects them to the penalties provided in Section 3228 of said Education Law (R. 14-15).

Respondent Commissioner of Education, purporting to act pursuant to Section 3210 of said Education Law (which provides that absence for religious education shall be permitted under rules that the Commissioner shall establish)

promulgated certain regulations, setting up the released time program, quoted above and set forth in the petition (R. 15-16). Also purporting to act pursuant to said statute, respondent Board of Education established additional regulations, relating to the operation of said released time program, quoted above and set forth in petition (R. 16-18).

The released time program is actually operated in the New York City public schools in the following manner: It is under the supervision of an organization known as The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, hereafter referred to as "Committee". This Committee was formed to promote religious instruction through use of the public school system and cooperates closely with the public school authorities in the management of the program and in promoting religious instruction. The Committee or church authorities distribute either to parents of public school children at home or in churches or to such children at or near the public school premises, cards for signatures to indicate the parent's approval of his child being released for sectarian religious instruction during school hours. Children whose parents sign such cards deliver them to the public school authorities who in turn deliver lists of the children whose parents so consent to the Committee or to the religious centers. These children are released regularly for one hour each week from attendance at public school on condition that they attend during the released hour at the religious center for sectarian instruction. Parents who sign such consent cards do so on the understanding with the public school authorities, in consideration of their children being released from public school attendance, that the children will attend and receive sectarian instruction at the religious centers. Children whose parents do not sign consent cards are separated from the other children and are

required to continue in attendance at the public schools. Released children receive sectarian religious teaching in the faith of the center at which they attend. Weekly, the religious centers file with the public school system and the Committee a list of those children who have been released from public school but have not reported for religious instruction at the religious centers (R. 18-20).

Under the aforesaid regulations (R. 15-18), the courses in religious education must be maintained and operated by or under the control of duly constituted religious bodies; pupils must be registered for religious courses and a copy of the registration filed with the local public school authorities; reports of attendance of pupils upon such courses must be filed with the school principal or teacher at the end of each week—together with a statement of the reason for any absence from religious instruction.

The administration of the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff (R. 20). The operation of the compulsory education system in New York assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects and pupils compelled by law to go to school for secular instruction are released, in part, from their legal duty on the condition that they attend religious classes (R. 20).

The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction; and in divisiveness because of difference in religious beliefs and disbeliefs; and is a utilization of the State's tax-established and tax-supported public school system to aid religious groups to spread their faith (R. 20-21).

The petition further alleges (R. 21-2), as conclusions of law, that the operation of the released time program, as aforesaid, and said statute and regulations, violate the First and Fourteenth Amendments of the United States Constitution.

The petition is based on the decision of this Court in the case of *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), as a comparison of said allegations with the opinion of this Court and the concurring opinions therein will readily show.

The answer of respondent Board of Education (R. 24-26) admitted the statutes and regulations but denied other material allegations of the petition, notably paragraphs 9th, 10th, 11th, 12th to 20th, 23rd, 24th (R. 24-25). Accompanying this answer were four annexed affidavits (R. 24-25, 27-49) which put into issue appellants' allegations regarding the operation of the released time program. Pleaded as an affirmative "defense" was the alleged insufficiency of the petition (R. 26).

The answer of respondent Commissioner of Education (R. 50-51) admitted the statutes and regulations but denied other material allegations of the petition, notably paragraphs 9th to 20th, inclusive, and 23rd and 24th (R. 50). Attached to this answer were five affidavits or statements putting into issue appellants' allegations as to the actual operation of the released time program. Pleaded as an "objection in point of law" was the alleged insufficiency of the petition.

(Parenthetically, it should be noted that the only statutory justification for or purpose of such affidavits and statements as were annexed to and submitted with said respondents' answers was to show "such evidentiary facts as shall entitle a respondent to a trial of any issue of fact" (N. Y. Civ. Prac. Act §1291).)

The answer of intervenor (R. 64-70) admitted the statutes and regulations but denied the other material allegations of the petition (R. 64-65) and alleged affirmatively three defenses (R. 65-70), none of which was passed on below and each of which manifestly is legally insufficient. A reply directed to the new factual matter alleged in said defenses was served by appellants (R. 71-72).

(c) Prior Proceedings

On June 27, 1948, the appellants each demanded of the New York State Commissioner of Education and the New York City Board of Education (hereinafter referred to as the respondents) that they rescind their regulations and discontinue the released time program in the New York public schools (R. 22). Upon respondents' refusal or failure to comply with these demands, appellants commenced this proceeding on July 27, 1948 by service of notice of motion and verified petition (R. 11-23). On the original return day, August 4, 1948 (R. 11), respondent Commissioner of Education interposed an objection to the jurisdiction of the Supreme Court, Kings County, which was consistently denied, though pursued by said respondent through the highest appellate court of the State of New York (see *Matter of Zorach* v. *Clauson*, 86 N. Y. Supp. (2d) 17; unan. affd. 275 App. Div. 774; unan. affd. 300 N. Y. 613). This collateral attack long delayed a hearing on the merits of the petition (R. 75-78). In January 1950, respondents served their respective answers to the petition which were supplemented by affidavits and contained an objection that the petition was legally insufficient (R. 24-49, 50-63, 26, 51). On May 12, 1949, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, referred to in the petition (R. 18-20), applied for and obtained

leave to intervene, under Section 1298 of the Civil Practice Act, on the ground that it was "specially and beneficially interested in upholding" the released time program (*Matter of Zorach* v. *Clauson*, 195 Misc. 531). (This Committee, according to said application, is composed of twelve laymen.) In June 1949, said intervenor served an answer containing denials and new matter (R. 64-70) as to which appellants served a reply (R. 71-2).

Appellants, by notice dated April 6, 1950, restored the matter to the calendar for a hearing (R. 73-4) and on the return day the matter was adjourned on respondents' application to May 15, 1950, when it was heard before Mr. Justice DiGiovanna. On April 10, 1950, intervenor moved for a final order "dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and in that such respondent is so entitled on the pleadings" (R. 79). After Mr. Justice DiGiovanna had rendered his decision on June 20, 1950 (R. 81-98) and made a final order in accordance therewith (R. 6-10), appellants applied to him for a reargument, which application was denied, by an unappealable order, with a memorandum (Ex. D, Statement as to Jurisdiction, pp. 70-71). On appeal from said final order (R. 4-5), the Appellate Division, two Justices dissenting, by an order made January 15, 1951, affirmed (R. 103-11).

On appeal to the Court of Appeals (R. 101-2) that Court, with one Judge dissenting, affirmed the order of the Appellate Division (R. 142-3).

(d) The New York Practice

Under Article 78 of the New York Civil Practice Act, the application for relief, in a "proceeding against a body or officer", shall be founded upon a petition "which shall contain a plain and concise statement of the material facts

on which the petitioner relies" and which "shall demand the relief to which the petitioner supposes himself entitled" (Civ. Prac. Act §1288). It is not necessary to set forth in the petition the evidence by which such statements are to be proved (Compare Civ. Prac. Act §1288 with §§1306 and 241), though the petition "may" be accompanied by affidavits and other written proof (Civ. Prac. Act §1288). On the other hand, the answer to the petition must contain proper denials and statements of new matter and must set forth such facts as may be pertinent and material to show the grounds of the action taken by respondent, which is complained of, and respondent is also required to submit, with the answer, affidavits or other written proof "showing such evidentiary facts as shall entitle him to a trial of any issue of fact" (Civ. Prac. Act §1291). The respondent may raise an objection in point of law warranting dismissal of the petition in the answer or by application to the Court on the return day "for an order dismissing the petition as a matter of law" (Civ. Prac. Act §1293). Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the Court must render "such final order as the case requires". But if a triable issue of fact is duly raised, a trial must be ordered (Civ. Prac. Act §1295). Statements made in the answer are not conclusive upon the petitioner (Civ. Prac. Act §1296).

The Court of Appeals has said that it is settled law in New York, on a motion under §1293 of the Civil Practice Act to dismiss such an Article 78 petition upon the ground that it fails to state facts sufficient to constitute a cause of action, that the truth of all of the facts alleged in the petition are deemed to be true in so far as relevant or material (*Matter of Hines* v. *State Board of Parole*, 293

N. Y. 254, 258 (1944); *Matter of Schwab* v. *McElligott*, 282 N. Y. 182, 185-6 (1940).

Under this practice "conclusions of law" in the petition are not deemed admitted on a motion to dismiss for insufficiency (*Matter of Hines* v. *State Board of Parole*, *supra*, at p. 258), but that does not apply to statements of ultimate facts. While the Court of Appeals stated (R. 122) that many of the allegations in the petition are "conclusory in character", it did not point out specifically any such allegations or state that such allegations consisted of conclusions of law. As Judge Fuld of that Court stated (R. 133) for purposes of such a motion all of the factual allegations of the petition must be deemed admitted, even though some of them are denied in whole or in part in the answers.

Specification of Assigned Errors to be Urged

Appellants will urge all of the errors assigned (R. 147-151) namely that the Court of Appeals erred in the following respects:

1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the final order of the Supreme Court of the State of New York, Kings County, which (a) dismissed petitioners' petition on the merits as a matter of law and denied in all respects petitioners' application for an order, directed against respondents requiring them to rescind their regulations and to cause the discontinuance of the released time program in operation, as prayed for in their petition and notice of motion; (b) denied in all respects petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings; (c) sustained the objections of the respondents in point

of law to the petition, i. e., that the petition failed to state facts sufficient to constitute a cause of action against either of the respondents; and (d) granted in all respects the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action.

2. In holding that Section 3210 of the Education Law of the State of New York, particularly Par. 1, subdivision b thereof, and the regulations established pursuant to said statute by respondent Commissioner of Education of the State of New York and by respondent Board of Education of the City of New York, are not in violation of the First and Fourteenth Amendments of the United States Constitution and do not constitute laws respecting an establishment of religion or prohibiting the free exercise of religion.

3. In holding that the operation of the released time program in the New York City schools, either as such operation is described in petitioners' petition herein or as such operation is admitted by the respondents and intervenor in their pleadings herein, does not violate the First and Fourteenth Amendments of the United States Constitution and does not violate the prohibition against laws respecting an establishment of religion or prohibit the free exercise of religion.

4. In holding that the petitioners were not entitled in this proceeding and on the pleadings of all the parties, to a final order, on the merits, granting the relief prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

5. In dismissing petitioners' petition on the merits as a matter of law; denying in all respects

the petitioners' application for an order against respondents as prayed for under Article 78 of the New York Civil Practice Act; sustaining the objections of the respondents in point of law to the petition; granting in all respects the intervenor's motion for a final order dismissing the proceeding on the merits; and denying in all respects petitioners' motion for an order, in any event, directing a trial of triable issues of facts raised by the pleadings.

6. In holding that the petition of the petitioners in this proceeding did not state facts sufficient to constitute a cause of action and to entitle them to the relief prayed for, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

7. In holding that the decision of the United States Supreme Court in the case of *McCollum* v. *Board of Education*, 333 U. S. 203, and the legal and constitutional principles stated and established therein were not controlling in the determination of the constitutional issues involved in this proceeding either as presented in petitioners' petition or as presented in the pleadings as a whole.

8. In holding that the decision of the New York Court of Appeals in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198 (decided in 1927 in respect of a released time system operated in White Plains, N. Y. and before the U. S. Supreme Court had decided *McCollum* v. *Board of Education*, 333 U. S. 203 or had held the freedoms guaranteed by the First Amendment were protected by the Fourteenth Amendment against laws or acts of the several states or their agencies) was a binding and controlling precedent in the determination of the constitutional issues involved and presented in this proceeding.

9. In holding that there are radical or substantial differences in elements or respects that are constitutionally important and crucial between the "released time" program in operation in Champaign County, Illinois, prior to its invalidation as unconstitutional in *McCollum* v. *Board of Education*, 333 U. S. 203, and the "released time" program presently authorized and established by statute and by respondents' regulations and operated in the New York City public schools.

10. In holding that the invalidation and discontinuance, as unconstitutional under the First and Fourteenth Amendments of the United States Constitution, of the New York system of released time so authorized and established by state statute and respondents' regulations and so practiced in New York City public schools, would represent " 'a government hostility to religion' which would be 'at war with our national tradition' " or would interfere with the free exercise of religion by anyone, or would interfere with any legitimate right of parents to direct the rearing and education of their children under the doctrine of *Pierce* v. *Society of Sisters*, 268 U. S. 510 or under the laws and Constitution of the United States.

11. In failing to hold that the New York system or program of "released time", as authorized and established by Section 3210, Par. 1, subdivision b of the Education Law of the State of New York, the regulations of the Commissioner of Education of the State of New York and the regulations of the Board of Education of the City of New York and as actually practiced and operated in the New York City public schools violates the First and Fourteenth Amendment of the United States Constitution in that such statutes, regulations and practices constitute a law respecting an establishment of religion and prohibiting the free exercise thereof.

12. In failing to hold that Section 3210, Par. 1, subdivision b of the Education Law of the State of New York, and the regulations of respondent Commissioner of Education and respondent Board of Education established pursuant thereto, and the operation of the released time program in the New York City public schools constitute a law respecting an establishment of religion and prohibiting the free exercise thereof in violation of the First and Fourteenth Amendments of the United States Constitution.

13. In failing to hold that the New York system of released time, as authorized and established by state statute and by respondents' regulations and as practiced and operated in the public schools in New York City is in violation of the constitutional requirement for a separation of church and state under the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

14. In failing to hold, within the principles laid down by the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203, that the New York system of "released time", as authorized and established by state statute and by regulations of the respondents and as practiced and operated in the public schools of New York City, is a system of "released time" in which (a) is involved the utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith and to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals; (b) is involved the close cooperation between public school authorities and a religious council in promoting religious education for public school children during public school hours on compulsory education time; (c) the operation of the state's compulsory education system

assists and is integrated with the program of religious instruction carried on by separate religious sects; (d) pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes; (e) the state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery; (f) the momentum of the whole public school atmosphere, planning and machinery is put behind the religious instruction; (g) the inevitable result is divisiveness among public school children and the exerting of pressure and coercion upon parents and such children to secure attendance by the children at classes for religious instruction; (h) state laws and state power aid one, or some, or all religions and prefer one religion over another; (i) taxes are levied to support religious activities or institutions; and (j) there is not a separation of church and state.

15. In failing to hold that the New York system of released time, as so authorized and established by statute and respondents' regulations and as operated in the New York City schools, is not subject to the same constitutional infirmities that the United States Supreme Court found in the case of *McCollum* v. *Board of Education*, 333 U. S. 203, in respect of the system or program of "released time" theretofore operated in Champaign County, Illinois.

16. In failing to hold, on the basis of the state statute, the regulations of the respondents and the admitted allegations of the petition, that the petitioners were entitled, on the merits, to an order in this proceeding granting all the relief prayed for by them in their petition.

17. In failing to hold that the limiting of participation in the New York system of released time to "duly constituted religious bodies" effects un-

lawful censorship of religion and effects a preference in favor of certain religious sects in violation of the First and Fourteenth Amendments of the United States Constitution.

The Nature of Appellants' Opposition to Released Time

Before considering the issues presented by this appeal, it is regrettably necessary again to state that appellants' opposition to released time is in no way motivated by hostility to religion or religious education.[1] As alleged in the petition (R. 22), the children of appellants receive religious instruction at their respective religious schools completely independent of the public school system. Manifestly, therefore, appellants are not motivated by anti-religious considerations.

Many responsible groups oppose released time upon considerations other than hostility to religion. Some oppose the program because it encourages truancy.[2] Others, because it is a divisive influence, having a detrimental effect on inter-religious relationships among public

[1] See statement of New York, Kings County, Supreme Court (R. 87-8) that the granting of the relief sought by appellants "would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship". Similar overtones are found in the Court of Appeals opinion by Froessel, J. (R. 120) and Desmond, J. (R. 131); also, in the briefs in that court of intervenor and respondent Board of Education, the latter, itself a civil, secular, public body, stating (at p. 38): "Unmistakably, the cause pleaded by the petitioners is a cause of irreligion. Secularism to the exclusion of religion under any and all conditions is their theme. They would do away with the American tradition that 'this is a religious people'."

[2] Public Education Association, *Released Time for Religious Education in New York City Schools* (1949).

school children.[3] Still others oppose released time because it is completely ineffective as religious education and gives rise to a false belief in many parents that it is an adequate substitute for real religious education.[4] Many educators oppose the program because it imposes a heavy administrative burden on the public school system.[5]

Most opposition to released time is based on the ground stated in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), that it constitutes a violation of the fundamental American principle of separation of Church and State.[6]

The baselessness of the charge that opposition to released time is motivated by hostility to religion is obvious from the fact that religious groups are among the strongest opponents of the program. In the *McCollum* case, briefs *amicus curiae* in opposition to released time were submitted in behalf of the Baptists Joint Conference Committee on Public Relations, representing the largest Protestant denomination in the United States; the Syna-

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[3] Editorial, *Public School Time for Religious Education*, Jewish Education, January, 1941, 130-132; Moehlman, *School and Church: The American Way* (3rd ed. 1944), p. 132 and *"The Church as Educator"* (1947), Chap. 10; *Editorial, Frontiers of Democracy*, December 15, 1940, p. 72; Beckes, *Weekday Religious Instruction: Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet, No. 6 (1946), pp. 8, 13-16.

[4] 2 Stokes, *Church and State in the United States*, 534, 548.

[5] Public Education Association, *Released Time for Religious Education in New York City's Schools*, 1945, p. 14.

[6] See various Amicus Curiae briefs filed in the U. S. Supreme Court in the *McCollum* case, *supra*, especially those filed on behalf of various religious groups and by American Civil Liberties Union. See, also, e.g., 2 Stokes, *Church and State in the United States*, 523-4, 530-31; Butts, *American Tradition in Religion and Education*, 189-190; National Education Association, *The Status of Religious Education in the Public Schools*, 19; Newman, *The Sectarian Invasion of our Schools, passim*. For a most recent summary of the reasons for opposing released time see Moehlman, *"The Wall of Separation Between Church and State"* (1951), at pp. 155-6.

gogue Council of America, representing almost all Jewish clergymen and congregations; the American Unitarian Association; and the General Conference of Seventh Day Adventists. In 1949, a bill to permit released time in Rhode Island was defeated as a result of the strong opposition of the Rhode Island Council of Churches.[7] Recently, in Pocatello, Idaho, the local Protestant ministerial association voted to bring suit to enjoin effectuation of a proposal to introduce released time religious instruction in the public schools of Idaho.[8] These and many other religious groups and leaders who have expressed their opposition to released time can hardly be termed anti-religious.

Commenting editorially on the decision of the New York, Special Term, court herein, *Zions Herald* said:

> "We still believe that the compulsory framework of public education should not be used for the teaching of religion, either in or out of the school building. There is a wedge involved here that will someday be an embarrassment to the defenders of separation of Church and State."

Zions Herald is edited by a group of prominent Methodist churchmen. It is impossible to conceive that any of these clergymen desire to further anti-religious or atheistic causes.

The contention that opposition to released time manifests hostility to religion was asserted by counsel in the *McCollum* case and was rejected by this Court in language which should have put an end to this fallacious and unfair argument:

> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public

[7] *New York Times*, April 12, 1949; *Providence Journal*, November 1, 1949.

[8] Religious News Service, November 21, 1951.

> school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (333 U. S. 203, 211-12)

Similarly, Mr. Justice Frankfurter said in his concurring opinion in that case:

> "The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom" (333 U. S. 203, 216).[9]

Appellants oppose the New York released time system, both as actually operated and as authorized by statute and regulations, because it conflicts with and tends to nullify the fundamental American principle of separation of Church and State, which is the only true guarantee of that

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[9] These statements did not forestall censure of this Court and its decision from some religious groups. See e.g., Statement of the Catholic Bishops, New York Times, Nov. 21, 1948, p. 63, col. 4; O'Neill, *Religion and Education under the Constitution* (1949), *passim*.

other basic American principle, freedom of religion.[10] Their cause is one for true Americanism, religious freedom for all and the American democratic, secular, free public school system.

In spite of the unfounded and abusive assertions herein, appellants have been heartened in the knowledge that Thomas Jefferson, one of the greatest of Americans and a truly religious man, was publicly and falsely denounced, in his time, as an "atheist" and "infidel"; and that "the clergy hated him for forcing the separation of Church and State" and referred to his famous "Virginia Bill for Religious Liberty" (a landmark document in the history of religious freedom) as the "atheist" law. Bowers, *Jefferson and Hamilton* (1925 Ed.), at pp. 103-5, 352, 454; Kimball, *Jefferson: The Road to Glory* (1943) at pp. 123-129.

The real issues herein should not be muddled by unfair references to totalitarianism, communism or atheism.

Summary of Argument

I. The specific issue in this case has already been decided by this Court. In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), this Court considered and passed upon the validity under the First and Fourteenth Amendments of released time programs containing the essential elements of the New York system as authorized by the New York statute and regulations. This Court ruled that such a program was violative of the United States Constitution. The New York courts therefore erred herein in holding that they were free to pass upon the constitutionality of the program and were not bound by the holding in the *McCollum* case.

[10] Cf. *Everson* v. *Board of Education*, 330 U. S. 1, 9-11, 15, 53, 63 (1947); *Illinois, ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212, 216.

II. Even if the specific facts of the New York released time program were not passed upon in the *McCollum* case and the particular issue is open, adherence to the meaning of the First and Fourteenth Amendments as expressed in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and reiterated in the *McCollum* case requires a determination that the New York program is unconstitutional. The program, as authorized by the statute and regulations, constitutes state aid to religion and involves governmental participation in the affairs of religious organizations and participation by religious organizations as such in the affairs of government. The New York system of released time, therefore, cannot be sustained unless this Court changes the meaning of the First and Fourteenth Amendments as expressed by both the majority and minority in the *Everson* case and reiterated in the *McCollum* case.

III. There is no basis in law, logic or history for modifying the meaning of the Constitution stated by this Court in the *Everson* and *McCollum* cases. An interpretation of the First Amendment narrower than that stated in those cases would in effect confer upon government powers that the Constitutional Convention and the Congress which adopted the First Amendment refused to confer. It would be inconsistent with the interpretation uniformly accepted during the more than a century and a half which has passed since the Constitution and Amendment were adopted.

IV. Invalidation of the released time system would not interfere with the right to freedom of religion of anyone; it would not constitute an overruling of *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); and, finally, it would not affect or be inconsistent with the practice of excusing absences of children from public schools on their religious holidays.

V. For the reasons stated above, we believe that judgment should have been granted to appellants on the basis of the conceded statute and regulations. We contend further that the court below erred in failing to accept as true the allegations of fact in the petition and in denying appellants an opportunity to prove material allegations insofar as they were contested. A trial of the triable issues of fact would disclose that the actual operation of the released time program in New York violates appellants' constitutional rights under any interpretation of the *McCollum* case. While judgment *for* the appellants could have been granted without trial, the allegations of the petition required at least a trial of the factual issues before judgment could be granted *against* appellants.

ARGUMENT

POINT I

Systems of released time such as that authorized by the New York Statute and Regulations were considered, passed upon and ruled invalid by this Court in the *McCollum* case.

It is appellants' primary and basic contention in this proceeding that the New York program of released time, as authorized by the statute and regulations (and even if operated as described by appellees in their answers and accompanying papers) was considered, passed upon and ruled invalid by this Court in the *McCollum* case. We submit, therefore, that the New York courts erred in holding that the decision in that case was not "binding precedent" (R. 116-8, 123).

A. The *McCollum* Decision

In the *McCollum* case, this Court considered an appeal by a parent of a school child in the public schools of Champaign, Illinois, seeking to invalidate the released time program in operation in that city. The undisputed facts, apart from others, showed that the plan had been instituted in 1940 through the action of a voluntary association consisting of lay and clerical members of the Jewish, Roman Catholic and some Protestant faiths, known as "The Champaign Council of Religious Education". (That association was similar in organization, operation and aims to the intervenor Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics in this proceeding (R. 18-20)). The Champaign Council obtained permission from the school board to offer classes in religious instruction to public school pupils during regular school hours in the school buildings. At the beginning of each term the religious classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend such religious instruction classes. Children who obtained such parental consent were released by school authorities from their secular school work for a period of thirty minutes each week in elementary schools and forty-five minutes in junior high schools on condition they attend the religious classes. Reports of their presence or absence thereat were to be made to their secular teachers. Children who did not obtain such parental consent were not released from public school duties but continued with their regular secular studies under the supervision of the public school authorities. The children who took religious instruction were separated from those who continued with regular school work and also into Protestant, Jewish or Roman Catholic groupings. The teachers and teaching

materials were selected, supplied and financed by the Council.

With Mr. Justice Reed dissenting, this Court held that such a released time program was unconstitutional as violative of the "establishment of religion" clause of the First Amendment (made applicable to the states by the Fourteenth Amendment). Four opinions were written: The opinion of the Court, written by Mr. Justice Black, in which Chief Justice Vinson and Mr. Justices Douglas, Murphy, Rutledge and Burton joined; a concurring opinion by Mr. Justice Frankfurter in which Mr. Justice Jackson concurred, as well as Mr. Justices Rutledge and Burton (who also concurred in the Court's opinion); a separate concurring opinion by Mr. Justice Jackson; and a dissenting opinion by Mr. Justice Reed.

B. The Opinion of the Court in the *McCollum* Case

The constitutional premise upon which this Court's opinion was based was set forth in the *Everson* case, 330 U. S. 1, 15-16, and reiterated in the *McCollum* case, 333 U. S. 203, 210-211. In both, this Court said that, at the very least, under the First and Fourteenth Amendments of the U. S. Constitution:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they

> may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"

Applying these principles, the Court found that such a released time system was unconstitutional—pupils compelled by law to go to school for secular education were released in part from their legal duty upon the condition that they attend religious classes; this was unquestionably a utilization of the tax-established public school system to aid religious groups to spread their faith; the state had afforded sectarian groups an invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory public school machinery, contrary to the First Amendment's principle of separation of Church and State.

It is clear from a reading of the Court's opinion that the Court intended to and did invalidate any released time program which involved the use of the tax-established and tax-supported, compulsory, public school machinery as an aid in recruiting children for religious instruction, regardless of the use of school buildings or other specific aspects of the use of the public school machinery in the Champaign situation. The state compelled all children to attend school for a specified number of hours weekly for secular instruction. It then, in effect, entered into an agreement with willing parents to release their children in part from that obligation, if they used the released time to participate in religious instruction. This release, the Court held, was an aid to religion in violation of the First Amendment.

The Court made it clear elsewhere in the opinion (333 U. S. 203, 204-205, 211) that what was involved was "the

power of the state to utilize its tax-supported public school system in aid of religious instruction" and "to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."

The Court's opinion rested basically on that aspect of the case. The Court took pains to note that the appellants there were relying, also, on the advantages which the plan gave to some Protestant groups over others, on the essentially involuntary nature of the plan in practice, on the power given school officials to control the selection of teachers, and on the power given the Council to determine the participating religious faiths, and then said:

> "In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend" (333 U. S. 203, 207, note 1).

It was the use of the tax-supported public school machinery as a recruiting or channeling agency for sectarian groups that the Court invalidated. The Court was careful to use language in its opinion which could not reasonably be construed as being limited merely to systems identical with that prevailing in Champaign. It stated:

> "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. *Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.* And it falls squarely under the ban of the First Amendment . . ." 333 U. S. 203, 209-210. (Emphasis supplied.)

The final paragraph of the Court's opinion stated the crux of the matter:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. *The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery.* This is not separation of church and state." 333 U. S. 203, 212. (Emphasis supplied.)

The Court, in so deciding the case, was familiar with all details of the New York system and its operation off the school premises. A brief *amicus* had been filed therein by Charles H. Tuttle, Esq., attorney for the intervenor in the present case, setting forth in detail the nature of the New York released time system. It was similarly referred to and discussed in Mr. Justice Reed's dissent which set forth, *in haec verba*, the state statute and the regulations of the Commissioner of Education attacked herein. The rules of the New York City Board of Education were noted and a description of the New York released time program as authorized by the regulations and rules was set forth. He also noted that these practices had been approved by the New York Court of Appeals in *People ex rel. Lewis v. Graves*, 245 N. Y. 195. (See 333 U. S. 203, 250-51.)

With full knowledge of all the relevant facts concerning the New York plan, this Court cast its opinion in terms which established the invalidity of released time systems of both the Champaign and New York types as violative of the American tradition of separation of church and state, incorporated in the First and Fourteenth Amendments. It held, as Mr. Justice Reed recognized, that under the "Court's judgment . . . *children cannot be released or dismissed from school to attend classes in reli-*

gion while other children must remain to pursue secular education," and *"religious instruction of public school children during public school hours is prohibited."* 333 U. S. 203, 241, 252. (Emphasis supplied.) As noted above, the Court expressly passed over additional facts urged in opposition to the Champaign plan, finding it "unnecessary" to consider them. 333 U. S. 203, 207, note 1.

In view of this express language in the opinion, it is surprising to find that the very facts which this Court regarded as irrelevant in the *McCollum* case are now relied on to distinguish it. We submit that the underlying rationale of that opinion cannot be so readily disregarded. Those who have read the opinion as meaning what it says have uniformly rejected the argument made by appellees here.

The Circuit Court of Champaign, directed by this Court to give effect to the *McCollum* decision, interpreted it as forbidding any form of released time. The final order for mandamus, issued by the Circuit Court, stated:

> "'It is HEREBY ORDERED (1) that the Board of Education of Community Unit School District Number 4, Champaign County, Illinois, immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in the manner heretofore conducted by said School District Number 71 in all public schools within the original School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools; and
>
> "(2) *To prohibit within said original School District Number 71 the use of the state's public school machinery to help enroll pupils in the several religious classes of sectarian groups.*" (Emphasis supplied.)

Neither the Champaign Board of Education nor the Champaign Council of Religious Education (the organization corresponding to intervenor herein) appealed from this order. Instead, *they discontinued religious instruction during public school hours and substituted after hour instruction.* Incidentally, no impairment of the effectiveness of the program of weekday religious instruction resulted. Religious News Service, July 7, 1948.[11]

The Illinois Supreme Court itself has recognized the *essential similarity,* for all practical and constitutional purposes, of the Champaign and New York plans. In its decision in the *McCollum* case upholding the Champaign plan, 396 Ill. 14 (1947), reversed in 333 U. S. 203, the Illinois Supreme Court relied upon the case of *People ex rel. Latimer* v. *Board of Education,* 394 Ill. 228 (1946).

[11] The same interpretation of the *McCollum* decision has been made by the United States Department of Interior. In 1949, the Office of Indian Affairs amended its regulations to prohibit religious education of Indian children during hours of attendance at Governmental schools. (*Manual for the Indian School Service,* Section 99 (6).) The amendment was made following an opinion by the Department's Solicitor that: "The decision of the Supreme Court in the case of *People of the State of Illinois ex rel. Vashti McCollum* v. *Board of Education* of School District No. 71, Champaign County, Illinois, decided March 8, 1948, prohibits the use of the so-called 'released time' by tax supported schools. *Hence, students of Indian Service schools may not be released for religious instruction for any part of the time prescribed for regular school classes.*" (Emphasis supplied.) The Supreme Court of Wisconsin also interpreted the *McCollum* decision as forbidding "*the use of public-school time* and the course of instruction given the children *through the compulsory-education law* to teach religious doctrines, creeds, and principles." *County of Milwaukee* v. *Carter,* 258 Wis. 139, 143 (1950). (Emphasis supplied.) See also, *Balaza* v. *Board of Education of St. Louis* (#18369, Div. No. 3, May 25, 1945 per Koerner, J., not off. rep.) which invalidated a system of released time in operation in St. Louis similar to that in New York City as unconstitutional on the basis of the *McCollum* decision, quoted in full in Butts, "*The American Tradition in Religion and Education* (1950) at pages 207-8; compare *Stein* v. *Brown,* 125 Misc. 692 (1925) an earlier New York case which invalidated a Mt. Vernon, N. Y. released time system, essentially similar to New York City's, in a cogent opinion.

That case, in turn, involved a system of released time exactly like New York's and the Illinois Supreme Court there cited and relied upon the earlier New York case of *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195 (1927), which the Court of Appeals in the present case held to be "binding precedent" (R. 118, 123-4). In its decision in the *McCollum* case, the Illinois Supreme Court said it was "apparent" that the Champaign system was "to all intents and purposes exactly the same" as the system involved in the *Latimer* case (which was also the New York system in the *Graves* case) and the fact that in one the classes were held in the schoolrooms while in the other the classes were held at places outside of school activities and property was of no significance. 396 Ill. 14, 23.

C. The Concurring Opinion of Mr. Justice Frankfurter

Although the New York Court of Appeals asserted that the opinion of this Court (concurred in by six of the nine justices) did not invalidate the New York system, it is clear that it placed its principal reliance upon the concurring opinion of Mr. Justice Frankfurter (R. 117-8).[12] We submit, however, that this concurring opinion does not require a determination different from the one reached under the Court's opinion.

The concurring opinion represented the views of a group of four justices who had taken an even more rigorous view of the requirement of separation than that taken by their five brethren in the prior *Everson* case. Their dissent in that case was expressly referred to at the opening

[12] It should be noted parenthetically that, notwithstanding the reliance of the Court of Appeals on Mr. Justice Frankfurter's concurring opinion, it effectively ignored his admonition regarding "the importance of detailed analysis of the facts" by its refusal to allow appellants to establish their factual contentions through a trial. See Point V below.

of the concurring opinion. 333 U. S. 203, 212. Furthermore, two of the justices who concurred in Mr. Justice Frankfurter's opinion likewise concurred in the opinion of the Court. It is difficult to believe that this group of four justices intended, in the *McCollum* case, to take a position just the reverse of the position they had taken the year before in the *Everson* case. Nor does the opinion itself support such a view.

After reviewing the history of secular and sectarian education in America, Mr. Justice Frankfurter said:

> "The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the *prohibition of furtherance by the State of religious instruction* became the guiding principle, in law and feeling, of the American people." 333 U. S. 203, 215. (Emphasis supplied.)

Mr. Justice Frankfurter went on to point out that this prohibition rested not on hostility to religion but on the firm belief that the public school system could best serve its proper role in a democracy if it remained free of religious entanglements. He said.

> "The sharp confinement of the public school to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of

> Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." 333 U. S. 203, 216-17.

Mr. Justice Frankfurter's concurring opinion concluded with the firm statement:

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" 333 U. S. 203, 232.

The portion of Mr. Justice Frankfurter's opinion which refers to the obvious fact that some forms of religious instruction for school children "could not withstand the test of the Constitution; others may be found unexceptionable", 333 U. S. 203, 231, is in no way inconsistent with the strong expressions recited above. The only specific plans referred to by Mr. Justice Frankfurter in that portion are those in which children receive religious instruction on Saturday and Sunday or in which the school day is shortened one day a week for all pupils, excusing or "releasing" them "to go where they please." 333 U. S. 203, 230. (This latter plan, as he points out, is sometimes known as "dismissed time", and is not the New York plan.) He distinguished these systems by pointing out that they do not contain the vice of placing "*the momentum of the whole school atmosphere and school planning* * * * *behind religious instruction*". *Ibid;* see also p. 222, note 14.

This "momentum," then, is the crucial test in Mr. Justice Frankfurter's view. Applying that test in the instant case plainly requires invalidation of the New York program on the admitted facts. It cannot seriously be questioned that, under the New York plan, "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction . . . precisely in order to secure for the religious instruction such momentum and planning." 333 U. S. 203, 230-31. That is the chief purpose of any released time plan. If it were not, as Mr. Justice Frankfurter noted (at p. 230), the proponents of the plan "might have drawn upon the French system, known in its American manifestation as 'dismissed time'."

D. The Dissenting Opinion of Mr. Justice Reed

Mr. Justice Reed, dissenting in the *McCollum* case, correctly interpreted the two principal opinions as establishing the same test:

> "* * * I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary regulations to facilitate attendance, falls under the ban. I reach this conclusion notwithstanding one sentence of indefinite meaning in the second opinion: 'We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial.' The use of the words 'cooperation', 'fusion', 'complete hands-off', 'integrate' and 'integrated' to describe the relations between the school and the Council in the plan evidences this. So does the interpretation of the word 'aid'. The criticized 'momentum of the whole

> school atmosphere', 'feeling of separatism' engendered in the non-participating sects, 'obvious pressure * * * to attend', and 'divisiveness' lead to the stated conclusion. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited." 333 U. S. 203, 240-31.

The purported essential differences between the New York and Champaign released time systems, upon which the decision of the Court of Appeals in the present case is based, were clearly presented to Mr. Justice Reed, as to the other members of this Court. His dissenting opinion explained the New York system in specific detail.

Referring to the statutes in California, Indiana, Iowa, Kentucky, Maine, Massachusetts, Oregon, Pennsylvania, South Dakota and West Virginia and taking New York "as a fair example," he stated:

> "Since all these states use the facilities of the schools to aid the religious education to some extent, their desire to permit religious education to school children is thwarted by this Court's judgment. Under it, as I understand its language, children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an 'aid' in establishing religion; the use of public money for religion." 333 U. S. 203, 252.

POINT II

The meaning of the First Amendment stated in the *Everson* case and reiterated in the *McCollum* case requires invalidation of the New York released time program even if all of the specific details of that program were not passed upon and decided in the *McCollum* case.

We contend that the *McCollum* case is determinative of the issue raised in the present case. But even if the *McCollum* case had never been decided, we submit that the meaning of the First Amendment as stated by this Court in the *Everson* case would require a determination adverse to the New York released time program.

Under the First and Fourteenth Amendments, the establishment of religion clause was held, by both the majority and minority in the *Everson* case, to mean at least this: "Neither a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion * * *. No tax in any amount, large or small can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa* * * *."

We submit that the New York released time system necessarily and inevitably results in a violation of each of these prohibitions.

A. Preferring One Religion.

Whenever the state undertakes to accord material benefits to religion, the inevitable result is preferential treatment of one or more religions over others. Even if equality is the expressed standard for a particular program of state aid, the translation of the program into reality always brings with it unequal treatment. Non-preferential aid to religious groups may be possible in theory, but it is doubtful if it has ever been achieved in practice.

All the reported cases on the validity of Bible reading in the public schools in which the version of the Bible used is disclosed involved the Protestant version;[13] most of the cases were suits brought by Catholic parents.[14] Cases involving the wearing of clerical garb by public school teachers, the incorporation of parochial schools into the public school system, the furnishing of free textbooks or free transportation to parochial schools, all involve preferential treatment accorded the Catholic religion.[15]

McCollum is typical of the cases in which commingling of Church and State is defended as non-preferential aid despite the fact that preference actually exists. The burden of the argument there was that this Court had erred in interpreting the First Amendment to bar non-preferential aid to religion,[16] and that the Champaign released time system was non-preferential.[17] Nevertheless, the proof established that general Protestant instruction was given in the regular classroom in the presence of the regular

[13] Keesecker, *Legal Status of Bible Reading*, U. S. Office of Educatin, Bull. No. 14 (1930).

[14] Johnson and Yost, *Separation of Church and State in the United States*, Ch. 4 (1948).

[15] Cf. *Everson*, 330 U. S. 1, 4, n. 2 (1947).

[16] 333 U. S. 203, 211 (1948); Appellees' Brief in *McCollum* case, pp. 24-86.

[17] Appellees' Brief in *McCollum* case, p. 86: "No preference between religions or between sects has been pointed out * * *."

public school teacher,[18] while Catholic instruction was given in basement rooms [19] and Jehovah's Witnesses and Lutherans were excluded altogether.[20]

Preferential treatment is as real a concomitant of the New York released time program as it was of the Champaign system. As we show below in Point V, appellants sought to prove on trial that the actual operation of the released time program in New York is preferential and unequal as between religions. But we go further; we urge that the regulations for the permissible operation of the released time program promulgated by the New York State Commissioner of Education *require* preferential and unequal treatment.

Regulation 2 of the Regulations promulgated by the Commissioner provides (R. 15, 29):

> "2. The courses in religious observance and education *must* be maintained and operated by or under the control of a *duly constituted religious body* or of *duly constituted religious bodies.*" (Emphasis supplied.)

This regulation not only imposes upon secular boards of education the responsibility of determining what is or is not a "duly constituted religious body"—a function which, under the Constitution, they may not perform,[21] particularly in the absence of legislative standards [22]—but, in addition, requires those boards to prefer such "duly constituted" religious bodies over those not found to be

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[18] Transcript of Record in *McCollum* case, p. 137.

[19] *Id.* at 150.

[20] *Id.* at 162.

[21] *United States* v. *Ballard*, 322 U. S. 78 (1944); *Watson* v. *Jones*, 80 U. S. 679 (1871).

[22] *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

"duly constituted" and over the religions of those parents who are not affiliated with any religious body.[23]

B. Aiding All Religions

Even if the New York released time program could be truly non-preferential and accord equal treatment to all religious groups, it would be, nevertheless, unconstitutional since its operation through the state's compulsory public school system would constitute state aid to religion. Without considering the monetary expense to the state, it can hardly be doubted that the program gives state aid to religion. It is not monetary aid alone which the Constitution prohibits a state from granting to religious bodies, and it is not the monetary expense of a specific released time program which renders it violative of the First Amendment.

Released time is unconstitutional because it is predicated upon and cannot operate without state aid. It requires state power—the use of the state's compulsory education law. The New York statute requires all children not attending parochial or private schools to attend public school for "full time day instruction." N. Y. Education Law, Section 3205, subdivision 1. The state enters into an agreement with willing parents to relieve their children in part from that obligation if they will use the released time to participate in religious instruction. This, we submit, is aid to religion, the third party beneficiary of the agreement, far more valuable than permitting use of public school premises for religous instruction.

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[23] The Champaign system was substantially similar. As described by Mr. Justice Frankfurter:

> "* * * While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent 'who in turn will determine whether or not it is practical for said group to teach in said school system'". (333 U. S. 203, 226-27.)

To deny this is to deny the very purpose of released time. The promoters of the program have repeatedly stressed the great benefit received by religious groups from the public school system by reason of the operation of the released time program. The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, urged and was granted the right to intervene in this case because it was, in the words of the New York statute, Civil Practice Act, Section 1298, "specially and *beneficially* interested in upholding" the validity of the released time program.[24] (Emphasis supplied.) The International Council of Religious Education, whose Department of Week-day Religious Education promotes released time programs throughout this country, has asserted with pride that use of the public school system as a recruiting agency for religious instruction has been enormously successful.[25]

Since the purpose and effect of released time is so clearly to aid religion, it is unquestionably unconstitutional under the *Everson* ruling, repeated in *McCollum*, that the state cannot "aid all religions." Those who defend released time admit this in effect when they concentrate their fire on that aspect of the two decisions. For the reasons already set forth by this Court, some of which are reviewed in Point III below, we believe that that ruling was correct and should not now be overturned.

C. Forcing or Influencing Profession of Belief

In operation of the released time program the state also uses its powers to force or influence children to attend religious instruction and to profess religious belief. Appellants' petition alleges (R. 20) that "The operation of the released time program has resulted and inevitably

[24] *Matter of Zorach* v. *Clausen*, 195 Misc. 531 (1949).
[25] Shaver, *They Reach One-Third*, Dec. 1943, p. 11.

results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." As we indicate below in Point V, appellants sought to prove, by a trial of the issues of fact, specific instances of such pressure and coercion, not sporadically or in a few schools, but of such widespread and frequent occurrence as to require a determination of inseparability.

Independent of such specific instances, we urge that the very nature of the released time program, operated as it is under the auspices of the public school system and with the manifested approval of the public school authorities, is coercive in effect. What Mr. Justice Frankfurter said of the Champaign system is equally true of the New York system:

> "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these

> non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." 333 U. S. 203, 227-8. (Footnotes omitted.)

Other courts have recognized the coercive effect of religious exercises conducted under the auspices of the public school system. The Supreme Court of Illinois has stated:

> "The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief."[26]

The Supreme Court of Wisconsin made a similar observation:

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[26] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910).

> "When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to others."[27]

An Iowa court came to the same necessary conclusion:

> "Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction; impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instruction there given?"[28]

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[27] *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177, 199-200 (1890).

[28] *Knowlton* v. *Baumhover*, 182 Iowa 691, 699-700 (1918). See also *Kaplan* v. *Independent School District of Virginia*, 171 Minn. 142, 155-56 (1927) (dissent):

> "To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage."

Judge Fuld, in his dissent in the Court of Appeals (R. 135-7), has clearly stated the coercive effect of the New York released time program:

> "The statute, the regulations and the pleadings in the record before us similarly make plain the use of the State's compulsory public school machinery, its atmosphere and its momentum. The vice in the use of such machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McCollum* (333 U. S., at p. 212). As in that case, so here, pupils compelled by law to go to school for secular education, *are released for an hour on condition that they attend religious classes.* Accordingly, there is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, there results an inevitable feeling of 'separatism' in pupils 'left behind'—to avoid which few will hesitate to conform to the practices of their fellow students (333 U. S., at p. 227). In addition, the release from the obligation to attend public school for the one hour a week is unquestionably an inducement to register for such courses, for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.
>
> "The cooperation of the public school system further serves to assure the attendance at the religious classes of the pupils enrolled therein. The regulations require that 'Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week', together with a statement of the reason for any

absence. Knowledge that an official record is kept of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes.

"Indeed, the entire vitality of the program lies in the prestige, planning, cooperation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as interpreted by the Supreme Court. While, therefore, there may here be no use of public school buildings and—I am willing to assume—no use of public school funds and but little of the time of public school personnel, no one may dispute that the state affords sectarian groups 'invaluable aid' in helping to provide pupils for their religious classes through the use of its compulsory public school machinery. This is more than a 'friendly gesture'—the phrase is Judge Fraessel's—between Church and State. If 'Separation means separation, not something less', if the relation between Church and State is 'a "wall * * *" not * * * a fine line easily overstepped' (per Frankfurter, J., concurring, 333 U. S., at p. 231), then, certainly, the New York City program violates the First Amendment."

This is not a purely theoretical consideration. It is real and immediate to the many groups, organizations and individuals, including appellants here, who have continued to oppose released time after years of experience with its operation. Only fair but firm enforcement of the constitutional guarantee can relieve them and their children of the unconstitutional coercion to which they are subjected.

D. Tax Support of Religious Activities

The New York released time program also violates the prohibition against use of tax-raised funds "in any amount, large or small, * * * to support any religious

activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'" Appellants' petition alleges that "administration of the [released time] system necessarily entails use of the public school machinery and time of the public school principals, teachers and administrative staff," and that the "operation of the released time program . . . is a utilization of the State's tax-established and tax-supported public school system to aid religious groups to spread their faith" (R. 20-1). As we indicate below in Point V, appellants sought to prove these allegations by a trial. But beyond that, we submit that, aside from trial evidence of actual operations, the very nature of the program as admittedly authorized by the statute and regulations requires a finding that tax funds are necessarily expended to make the plan effective (R. 29, 30, 31, 34). The program cannot operate without use of the administrative machinery of the school system and the time consuming attention of principals, teachers and school clerks.

It is no answer to argue that the expense to the school system is so small as to fall within the *de minimis* rule. In the first place, an examination into the facts will, we believe, establish that the expense is substantial and continual. But in any event, the *de minimis* rule has no application where State expenditures are attacked as an aid to religion and hence a law respecting an establishment of religion.

The monetary loss suffered by a taxpayer as a result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress,[30] at least where the object of the expenditure is not ex-

[29] Public Education Association, *Released Time for Religious Education in New York City's Schools*, 1945, p. 14.

[30] Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-487 (1923).

pressly prohibited by the Constitution. In respect to matters of religious liberty and separation of church and state, however, the quantity of the monetary appropriation is without significance. When a State makes any appropriation, no matter how slight, in aid of religion, religion has come within the cognizance of Civil Government.[31] Madison well recognized this when he warned: "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[32] It is, we submit, the fact, not the extent, of State aid which controls.

Even the smallest contribution of State aid brings with it the evils which the separation principle was designed to prevent. It invites conflict among religious groups as to how such aid is to be dispensed. In this case, as in all others we believe, it entails *preferential* government approval of some sects and not of others.

Finally, small though such aid may be, it is constitutionally objectionable because it is uniquely governmental; and therefore carries with it the coercive power of the State. The time spent by school officials in administering the public schools' necessary contribution to the released time program can be obtained only from the government. For that reason alone, it cannot be regarded as negligible.

E. Governmental Participation in Religious Affairs and Vice Versa

Appellants' petition alleges that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, which "was formed to

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[31] Madison's *Remonstrance* (set forth in Appendix to *Everson* case, 330 U. S. 1, 63-72), par. 8. See also *Harfst* v. *Hoegen*, 349 Mo. 808, 817 (1941).

[32] *Id.* at par. 3.

promote religious instruction through use of the public school system * * * cooperates closely with the public school authorities in the management of the program and in promoting religious instruction" (R. 19). By a trial, appellants sought to prove that this cooperation is substantial and mutual.

Moreover, the Coordinating Committee was allowed to intervene, and actively participated, in this action, not as an *amicus curiae* (as was the case with the religious groups in the *McCollum* case), but as a full and equal party. This is a clear judicial recognition, sanctioned by the Commissioner of Education and the New York Board of Education in consenting to the intervention, that the Coordinating Committee is in effect a partner with the public school authorities in the operation of the released time program.

It is such participation by church and state in each others' affairs for the purpose of promoting sectarian religion which this Court in the *Everson* and *McCollum* cases ruled was constitutionally impermissible. It is just such government participation in the affairs of religious organizations and religious participation in the affairs of government which the Fathers of our Constitution sought at all costs to avoid. As Jeremiah S. Black stated in his address on Religious Liberty:

> "The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics—that is to say, they meant that one should never be used as an engine for any purpose of the other * * *. For that reason they built up a wall of complete and perfect partition between the two."[33]

The validity of Black's observation is manifest in the position of religious freedom in contemporaneous totali-

[33] *Essays and Speeches* (1886), 51; quoted in *McCollum* case at p. 219, note 8.

tarian states. Wherever the church or the state seeks to use the other as an engine for its own purpose, that is, wherever a state or a church pierces the wall of partition between them, freedom inevitably suffers.[34] In this country, religious freedom is secure because neither religion nor the state may use the other as "an engine for any purpose of the other," or, as this Court stated in the *McCollum* case "* * * the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free within its respective sphere."

POINT III

No adequate reason has been presented for this Court to repudiate its interpretation of the First Amendment in the *Everson* and *McCollum* cases.

When the Champaign released time program was presented to this Court in the *McCollum* case, its defenders showed an awareness that the program must fall unless the interpretation of the First and Fourteenth Amendments of both the majority and minority in the *Everson* case was repudiated. The appellees, therefore, argued that historically the First Amendment was intended to forbid only governmental preference of one religion over another, not impartial governmental aid to all sects, and also that the establishment of religion clause was inapplicable as a prohibition against the States. In the *McCollum* case, the Court gave "full consideration" to the arguments presented but said it was unable to accept either of these contentions (333 U. S. 203, 211).

[34] Timasheff, *Religion in Soviet Russia, 1917-1942*; Bates, *Religious Liberty* (1945), 2-9, 14-23, 40-49; Binchy, *Church and State in Fascist Italy* (1941).

We submit that the New York released time program, no less than the Champaign system, must fall unless the *Everson-McCollum* principles are repudiated. Realization of this result, we believe, is implicit in the majority opinion of the Court of Appeals in the present case (R. 119-120), and is explicit in Judge Desmond's concurring opinion (R. 129-131). The burden of the latter's opinion is a frontal attack upon the *Everson-McCollum* interpretation of the First Amendment which, he states, has "no basis in the only history which is pertinent: the history of the drafting and adoption of the amendment itself" (R. 129). To Judge Desmond, no "so-called * * * 'principle' of complete separation of religion from government" has ever existed (R. 126). He contends that "an argument contrived for the proposition that * * * release of children from secular schools for religious education amounts to 'an establishment of religion' or prohibits the free exercise thereof * * * construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording and intendment, the metaphor * * * or loose colloquialism of a 'wall between church and State'" which "has never been more than a figure of speech" (R. 127). Judge Desmond's opinion thus adopts an interpretation of the First Amendment which, though twice rejected by this Court, has found ready acceptance and passionate defense in some religious circles.[35]

[35] See. *e.g.*, Statement of Catholic Bishops, *supra:*

> "To one who knows something of history and law, the meaning of the First Amendment is clear enough from its own words: 'Congress shall make no laws [sic] respecting an establishment of religion or forbidding [sic] the free exercise thereof.' The meaning is even clearer in the records of the Congress that enacted it. Then and throughout English and Colonial history 'an establishment of religion' meant the setting up by law of an official Church which would receive from the government favors not equally

The issue once more is before this Court and once more the Court is called upon to reaffirm and apply the principles announced unanimously and definitively in the *Everson* case.

Our discussion of that issue is confined to the historical aspect of the Amendment since the opponents of the *Everson-McCollum* principle have argued chiefly that it misreads the intent of the framers. No real effort has been made by them to refute the fact that the principle is necessary to the preservation of religious freedom. Those who, like appellants here, oppose released time and other supposedly non-preferential forms of govern-

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accorded to others in the cooperation between government and religion—which was simply taken for granted in our country at that time and has, in many ways, continued to this day. Under the First Amendment, the Federal Government could not extend this type of preferential treatment to one religion as against another, nor could it compel or forbid any state to do so.

"If this practical policy be described by the loose metaphor 'a wall of separation between Church and State', that term must be understood in a definite and typically American sense. It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term 'separation of Church and State' as it has become the shibboleth of doctrinaire secularism. * * *

"We, therefore, hope and pray that the novel interpretation of the First Amendment recently adopted by the Supreme Court will in due process be revised. To that end we shall peacefully, patiently and perseveringly work. * * *

"We call upon our Catholic people to seek in their faith an inspiration and a guide in making an informed contribution to good citizenship. We urge members of the legal profession in particular to develop and apply their special competence in this field. We stand ready to cooperate in fairness and charity with all who believe in God and are devoted to freedom under God to avert the impending danger of a judicial 'establishment of secularism' that would ban God from public life."

See also: O'Neill, *Religion and Education Under the Constitution* (1949); Parsons, *The First Freedom* (1948); Murray, *Law or Prepossession?* 14 Law and Contemp. Problems, 23 (1949); Van Dusen, *God in Education* (1951); Pike, *Secularization and the Church*, Bulletin of General Theological Seminary, June 1951, 21.

ment aid to religion know that true separation is needed as much today as it ever was. It is needed to preserve both government and religion from the evils which commingling of Church and State inevitably bring. For the reasons fully rehearsed in the briefs submitted in the *McCollum* case, we believe that the framers were right in adopting the separation principle and that this Court was right in interpreting it in a manner which gives it full vitality.

A. The Deep Roots of the Separation Principle

The principle of the separation of religion from government and the obligation of neutrality between religious and non-religious groups imposed by that principle are not the recent invention of this Court.[36] They are based

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[36] Besides the references in Mr. Justice Frankfurter's concurring opinion in the *McCollum* case, 333 U. S. 203, 218-219, see, *e.g.*, Madison: "* * * strongly guarded * * * is the separation between Religion and Government in the Constitution of the United States." Fleet, *Madison's "Detached Memoranda"*, 3 William & Mary Quarterly 534, 555 (3rd Ser. 1946); Philip Schaff: "* * * the state must be equally just to all forms of belief and unbelief which do not endanger the public safety", *Church and State in the United States*, 10 (1888); Francis Lieber: "It belongs to American liberty to separate entirely that institution which has for its object the support and diffusion of religion from the political government. * * * No worship shall be interfered with, either directly by persecution, or indirectly by disqualifying members of certain sects, or by favoring one sect above others; and no church shall be declared the church of the state, or the established church; *nor shall the people be taxed by the government to support the clergy of all churches*, as is the case in France"; *Civil Liberty and Self-Government* (1852); James Bryce: "It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seem to be no two opinions on this subject in the United States"; *The American Commonwealth*, Vol. 2, p. 766 (3rd ed. 1894); David Dudley Field: "* * * the greatest achievement ever made in the cause of human progress is the total and final separation of church and

on the concept expressed by Madison in the statement that religion is "not within the cognizance of Civil Government,"[37] and of the Presbytery of Hanover against the same Assessment Bill which was the subject of Madison's Remonstrance:

> "The end of Civil government is security to the temporal liberty and property of Mankind; and to protect them in the free exercise of Religion. Legislators are invested with power from their Constituents for these purposes only; and their duty extends no farther. Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be resigned to the will of the society at large; and much less to the Legislature, which derives its authority wholly from the consent of the People; and is limited by the Original intention of Civil Associations * * *."[38]

That this principle is based on friendliness to religion rather than on enmity is evident from its warm espousal by religious bodies.[39] It is even more evidenced by the position of strength and influence which religion has achieved in the United States under the protection of the

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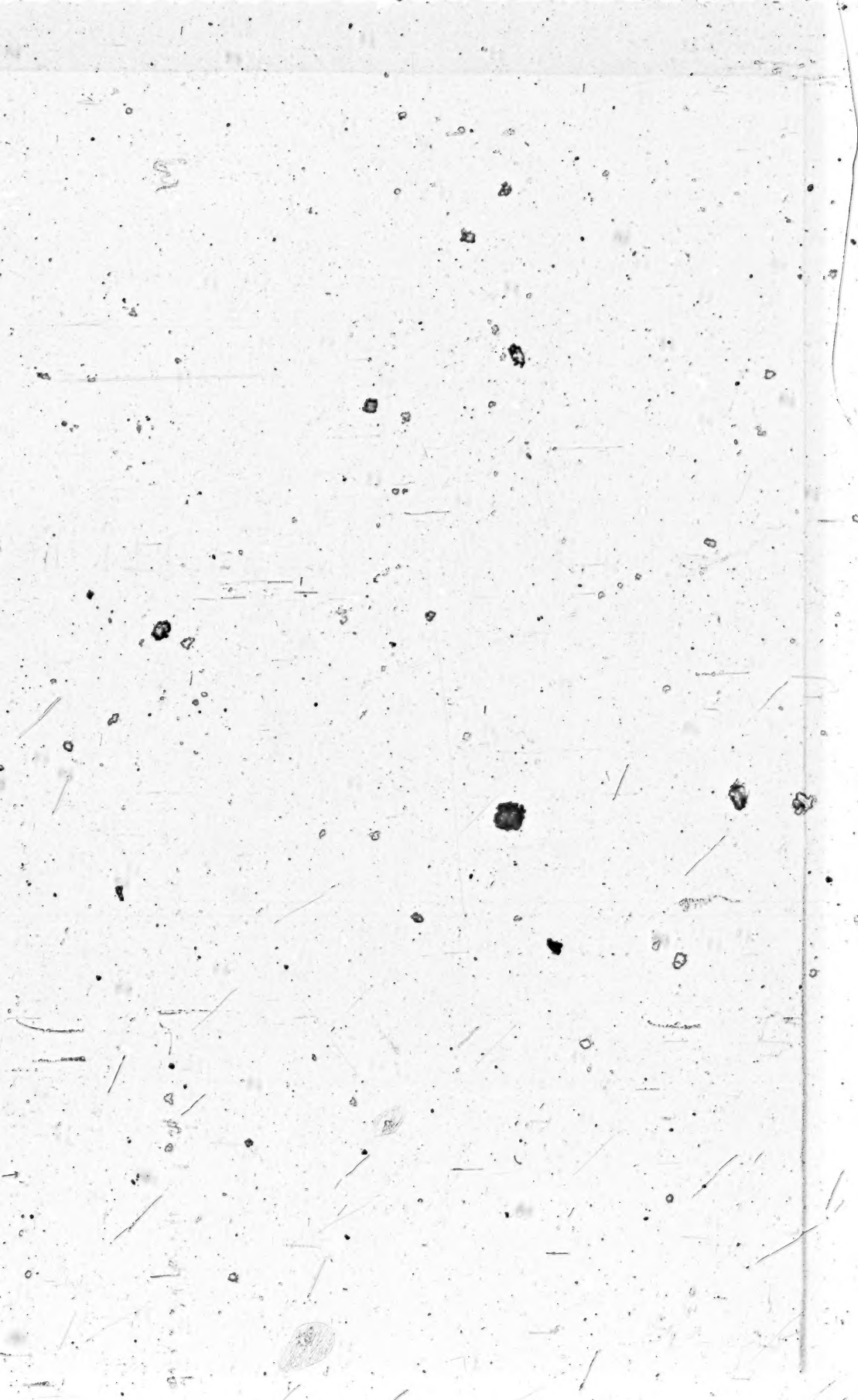
state. If we had nothing else to boast of, we would lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private concern, into which other men have no right to intrude. To measure the stride thus made for the Emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world." Quoted in Stokes, *supra*, Vol. 1, p. 37.

[37] *Memorial and Remonstrance* paragraph 8.

[38] *American State Papers on Freedom in Religion* (1949), p. 110. See also *Petition of Sundry of the Inhabitants of Rockingham County against the Assessment Bill* (quoted in Stokes, *Church and State in the United States*, Vol. 1, p. 363): "* * * the power of Civil Government relates only to Men's Civil Interests. * * *"

[39] *Ibid.* See also, *Petition of the General Committee of the Baptists against the Assessment Bill*, quoted in Stokes, *supra*, Vol. 1, p. 373.



guaranty of religious liberty and separation of Church and State.

By and large, the American people have been faithful to the unique and radical experiment formalized in the "establishment" and religious liberty provision of the First Amendment.[40] So conclusive was Madison's victory in the Virginia legislature that in the more than a century and a half since the Amendment was adopted, Congress has never enacted—or indeed been called upon to consider—a bill for the support of teachers of religion.[41]

B. The Effect of Separation on Religion

Under this system of mutual independence of church and government, religion has flourished in this country to an extent unparalleled elsewhere.[42] In 1790, not more than

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[41] The latest Congressional expression on the question was its enactment in July 1950, of the Organic Act of Guam (Public Law 630 of the 81st Congress), Section 5, subdivision (p) of which provides: "No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit or support of any priest, preacher, minister or other religious teacher or dignitary as such." In December 1950, resolutions for public aid to religious education and released time were defeated at the White House Mid-Century Conference on Children and Youth. This conference, representing every area of American life, instead affirmed the principle of separation and the preservation of the American secular public school system. *New York Times*, December 1, 6, 8, 1951.

[40] *Everson* v. *Board of Education*, 330 U. S. 1, 14. See also, Schaff, *Church and State in the United States* (1888), p. 15:

> "To be just, the state must either support all or none of the religions of its citizens. Our government supports none, but protects all."

[42] By 1830, DeTocqueville could note that "there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America." *Democracy in America* (1 Amer. ed. 1851), Vol. 1, p. 332. A half century later, Bryce remarked that while the "legal position of a Christian church is in the United

one out of eight Americans[43] and possibly as few as one out of twenty-five[44] belonged to any church. Today, at least one out of every two Americans is a church member.[45] Mr. Justice Rutledge was clearly right when he stated that complete separation between religion and the state is best, not only for the state, but for religion as well.[46]

C. The Proposed Distortion of the First Amendment

Those who argue that the First Amendment permits non-preferential government aid to religion misread both its terms and its history. They would take an Amendment designed to prevent certain legislative action and convert it into an affirmative grant of legislative power.[47]

Absent the First Amendment, it is clear that Congress has no power to aid religion, preferentially or non-preferentially. As Madison put it, "there is no shadow of

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States simply that of a voluntary association or group of associations corporate or unincorporate, under the ordinary law", yet "the influence of Christianity seems to be * * * greater and more widespread in the United States than in any part of western Continental Europe, and I think greater than in England." *American Commonwealth* (1st Ed.) 561. See, also, Schaff, *Church and State in the United States* (1888), p. 55:

> "* * * the American nation is as religious and as Christian as any nation on earth, and in some respects even more so, for the very reason that the profession and support of religion are left entirely free."

[43] Stokes, *Church and State in the United States*, Vol. 1, 229-230.

[44] Garrison, *History of Anti-Catholicism in America*, Social Action, p. 9 (Jan. 15, 1948).

[45] U. S. Department of Commerce, *Census of Religious Bodies*, 18 (1936); *Yearbook of American Churches* (1951 edition), p. 239.

[46] Dissenting in *Everson* case, 330 U. S. 1, 59.

[47] See *Powe* v. *U. S.*, 109 F. 2d 147 (C.C.A. 5th 1940): "That the first ten amendments were intended as limitations on the power of the federal government and are not grants of power to it has been established from the beginning. A flat prohibition against the regulation of a matter in one direction cannot result in endowing Congress with power to regulate it in another direction."

right in the general government to intermeddle with religion."[48] "The Government," said Madison, "has no jurisdiction over it."[49] Indeed, there was a strong feeling that the First Amendment was "altogether unnecessary inasmuch as Congress has no authority whatever delegated to them by the Constitution to make religious establishments".[50] Dissatisfied with the absence of conferred power, the states demanded an express prohibition which it was the intent of the framers of the First Amendment to supply.[51] The result of adoption of the premise underlying the decision of the court below in the present case would be to turn a prohibition against laws respecting an establishment of religion into a grant of power so passionately sought to be withheld from the Federal Government.[52]

If this Court were to adopt the limited interpretation of the First Amendment urged by the proponents of

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[48] Writings of Madison, Vol. 5, p. 176 (Hunt ed. 1920).

[49] *Id.*, p. 132.

[50] 1 Annals of Congress, 729 (1789).

"But it [the Constitution] is neither hostile nor friendly to any religion; it is simply silent on the subject, as lying beyond the jurisdiction of the general government." Schaff, *Church and State in the United States* (1888), pp. 39-40.

[51] Beard, *The Republic*, 160, 170 (1944): "The Constitution does not confer upon the Federal Government any power whatever to deal with religion in any form or manner. * * * The First Amendment merely confirms the intention of the framers." See also Bancroft's letter to Schaff: "* * * Congress therefore from the beginning was as much without the power to make a law respecting the establishment of religion as it is now, after the amendment has passed." Schaff, *Church and State in the United States*, at p. 137.

[52] See Hamilton's prophetic warning in *The Federalist No. 84:* "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?" *Federalist Papers* 559 (Mod. Lib. ed. 1937).

released time and similar "non-preferential" aid by the State to religion, it would be enacting into the Constitution what the Congress which framed the amendment specifically refused to enact, although it had two opportunities to do so. Twice when the First Amendment was debated in the Senate it was proposed to substitute either of the following for the House versions:

> "Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

And:

> "Congress shall make no law establishing any particular denomination or religion in preference to another or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

These versions expressly and unambiguously spelled out the limited interpretation of the First Amendment. Yet both proposals were rejected.[53] We feel confident that

[53] *Journal of Proceedings of the First Session of the United States Senate*, pp. 63, 70 (for August 25 and September 3, 1791). The text of the Journal entry is as follows:

"The resolve of the House of Representatives * * * was read, as followeth:

"'Art. III. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.'

* * * * * * *

"The Senate resumed the consideration of the resolve of the House of Representatives on the amendments to the Constitution of the United States.

* * * * * * *

"On motion to amend Article the third, and to strike out these words: 'Religion, or prohibiting the free exercise thereof', and insert 'No religious sect or society in preference to others:'

It passed in the negative.

On motion for reconsideration:

It passed in the affirmative.

On motion that Article the third be stricken out:

It passed in the negative.

'On motion to adopt the following, in lieu of the third Article:

this Court will not write into the Constitution what the Congress which framed the First Amendment specifically rejected.

POINT IV

Invalidation of the released time system would not interfere with freedom of religion nor would it constitute an overruling of *Pierce* v. *Society of Sisters*.

Much stress is placed in the opinion of the court below on the argument that invalidation of the released time program would violate the religious freedom of those wishing to have their children receive religious education during regular school hours (R. 120-121). The weakness of this argument is exposed by taking it at face value. It requires the conclusion that every state which has failed to institute a released time system is violating the Constitution.

The argument rests on a false premise. It assumes that the purpose of the plan is to give school children an additional hour of free time so that they and their parents can make a free choice, in the exercise of their constitu-

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"Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society:'

It passed in the negative.

"On motion to amend the third Article, to read thus: 'Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:'

It passed in the negative.

"On the question upon the third Article as it came from the House of Representatives:

It passed in the negative.

"On motion to adopt the third Article proposed in the resolve of the House of Representatives, amended by striking out these words, 'Nor shall the rights of conscience be infringed:'

It passed in the affirmative."

tional freedom, as to religious education. This is not so; were it so, the proponents of released time would not so vigorously oppose the dismissed or free time system under which the school week is shortened one hour *for all children*, those not wishing to participate in religious instruction as well as those who do. Such a plan may well raise no substantial constitutional issue. It would leave parent and child free in matters of religion. It would adequately meet the claim that the public school preempts so much of the child's time as to leave none for religious education. But it would not be released time.

The crucial aspect of released time is not the release of children wishing to partake of religious instruction, *but the non-release of those not wishing to do so.* The effectiveness of the released time program (to the extent that it is effective) rests upon the compulsory school attendance law. It operates only because the state has the power to corral children and require them to obtain secular education for a given number of hours weekly.[54] Under the released time plan, the state rebates one hour weekly to those children whose parents contract that the rebated hour shall be used exclusively for religious instruction under the auspices of a "duly constituted religious body." Other children are compelled to remain in the public school during that hour. This is real compulsion and real abridgment of freedom; they lie, we submit, not in the invalidation of the released time program but in its perpetuation.

The argument that invalidation of the released time program would be inconsistent with the decision of this Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), has

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[54] The New York *Education Law* (Sec. 3205, subdiv. 1) establishes the requirement of "full-time day instruction." The By-Laws of the Board of Education of the City of New York (Sec. 77) define that statutory requirement as five hours of instruction.

been so completely answered by Judge Fuld in his dissent below that we need only quote from his opinion (R. 138-139).

> "I perceive no merit in the contention for which *Pierce v. Society of Sisters* (268 U. S. 510), is cited —that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the complete 'release' of a child from any attendance at a public school so as to permit him to pursue his studies in a parochial school, the parent has, *a fortiori*, a right to insist on the release of the child for but a small percentage of school time.
>
> "The argument goes too far. It assumes that, even though the child is enrolled in a public school, the parent has a constitutional right to remove him therefrom for any period and at any time for instruction in sectarian religious courses. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state cannot constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or non-sectarian. No one questions the right of parents to send their children to private or parochial schools of their own choosing. Parents do not, however, have any constitutional right to interfere with the functioning of the public school system or to demand that it serve as an adjunct to a plan of religious instruction. Moreover what the *McCollum* case concerned itself with, and what is here involved, is not the right of a parent, but rather a basic limitation on the power of the state. The *McCollum* case, as we have noted, invoked the doctrine of separation, not against the parent's right, but against the state's power, and held that the state may not commingle a program of religious instruction with the secular education given in its

public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion."

Nor, we submit, is there merit to the analogy drawn by the Court of Appeals to the practice of excusing a child who is absent to observe his religious holiday (R. 121). Here, again, we need only quote from Judge Fuld's dissent (R. 140):

> "Nor may the released time program be justified as merely another application of the immemorial and unchallenged practice of releasing children from school attendance to permit them to observe their religious Holy Days. The suggested analogy confuses two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise prescribed by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, an interference with that liberty of worship, which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, passim.) Obviously, no such issue is here involved."

POINT V

Even if appellants were not entitled to a judgment on the pleadings, the New York courts erred in denying appellants the opportunity to prove by a trial of the facts that the actual operation of the program necessarily violates constitutional prohibitions.

The decision of the court below is based upon a finding that the New York program differs in material aspects from the Champaign plan declared unconstitutional in the *McCollum* case (R. 116-117). This, of

course, is a finding of fact, and even if it had been made after trial, it would not be binding upon this Court. *Chambers* v. *Florida*, 309 U. S. 227, 228-29 (1940); *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939). Actually, however, the finding was not made after trial. Indeed, it can hardly be called a finding: It is a dictate rather than a finding—a dictate which the New York courts prevented appellants from challenging by factual evidence upon a trial.

This action of the court below was not merely an erroneous application of state law on a matter of procedure. Under the narrowest possible view of the *McCollum* decision, any released time plan is unconstitutional if, in actual practice, it makes use of public funds and facilities or the coercive effect of the public school machinery. To uphold a released time plan without permitting proof of allegations of such use or coercion is manifest error under the decisions of this Court.

A. The Theory of the Petition

The petition and proceeding in this case are based on two theories: (1) as a matter of *law*, the New York released time program as authorized by statute and respondents' regulations is unconstitutional; (2) as a matter of *fact*, the New York released time program, as actually operated, is unconstitutional, whether or not it would be unconstitutional if operated in the manner authorized by the statute and regulations.

The two-fold aspect of appellants' claim was clearly stated in the demands made by them upon respondents. The demands, identical in respect to both appellants and both respondents, read (See Record on Appeal, *Zorach* v. *Clauson*, 275 App. Div. 774; 300 N. Y. 613):

> "My attorneys advise me that [1] such practice of released time, as well as [2] the regulations or

statutes which may authorize them, are invalid in that they violate the Constitution of the United States and the State of New York particularly in the light of the decision of the United States Supreme Court in *People ex rel. McCollum v. Board of Education.*

"I therefore respectfully request that [1] the released time program be discontinued and [2] that you cancel and rescind all regulations purporting to authorize the released time program." (Numerals added.)

The petition herein also clearly shows that appellants attack not only the regulations but the actual practice as well. The prayer for relief demands not only that the regulations be abrogated but that the practice be discontinued:

"WHEREFORE, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education to [1] discontinue the released time program as described in the petition and [2] abrogate and rescind all regulations established by it authorizing such released time program; and further commanding respondent Commissioner of Education [1] to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and [2] to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises." (R. 23; Numerals added.)

B. The Factual Assumptions Made by the Court Below

The New York courts have completely disregarded the second aspect of appellants' petition. They have declared that the New York plan operates in a manner which is constitutionally different from that in which the Champaign system operates and have refused to permit appellants to prove the contrary.[55] In the following table we set forth what the New York courts have declared to be the constitutionally significant differences and what in fact a trial would establish:

New York Courts' Conclusions of Differences Between New York and Champaign Programs	What a Trial Would Show
1. The Champaign Plan, unlike the New York Plan, had no underlying enabling statute (R. 90, 116).	Plainly irrelevant. It is also inaccurate. The Champaign Plan was held to have been authorized by an Illinois statute; if it had not, this Court would not have had jurisdiction of the case on appeal, as it expressly noted (333 U. S. 203, 206).
2. Under the New York Plan religious training takes place off school property (R. 90, 116).	True.
3. Under the New York Plan the place for instruction is not designated by school officials (R. 90, 116).	True.
4. There is no element of segregation under the New York Plan (R. 90, 116).	Appellants deny this and were prepared to prove the contrary.
5. Under the New York Plan there is no supervision or approval of religious teachers or course of instruction by school officials (R. 90, 116).	This is true, but there was no supervision of the course of instruction by school officials in Champaign. Hence, the only difference here is that there is no approval of the selection of the religious teachers.

[55] The New York courts relied in this connection on a schedule set up in an affidavit submitted in support of respondent Board's answer (R. 24-5, 27, 35-8, 89-91). The purpose of this affidavit, of course, was to put in issue the allegations of the petition.

New York Courts' Conclusions of Differences Between New York and Champaign Programs	What a Trial Would Show
6. Under the New York Plan school officials do not solicit or recruit pupils for religious instruction (R. 91, 116).	Appellants deny this and were prepared to prove the contrary.
7. Under the New York Plan registration cards are not furnished or distributed by the school and there is no expenditure of public funds (R. 91, 116, 117).	Appellants deny this and were prepared to prove the contrary.
8. Under the New York Plan non-attending pupils stay in their regular classrooms, continuing significant educational work (R. 91).	Appellants deny this and were prepared to prove the contrary.
9. Under the New York Plan no credit is given for attendance at the religious classes (R. 91, 117).	Technically, this is true, but the religious schools report attendance to the public school, under the regulations. See next item.
10. Under the New York Plan there is no compulsion by school authorities with respect to attendance or truancy (R. 91, 117).	Appellants deny this and were prepared to prove the contrary.
11. Under the New York Plan there is no promotion or publicizing of the released time program by school officials (R. 91, 116-117).	Appellants deny this and were prepared to prove the contrary.
12. Under the New York Plan no public moneys are used (R. 91).	Appellants deny this and were prepared to prove the contrary.

These items merit detailed consideration since they are the basis of the decision of the Court of Appeals foreclosing any factual challenge of the New York released time program.

The Court of Appeals (R. 116) as well as Special Term (R. 90) stated, without a trial, that it was not

true here as it was in Champaign that "pupils taking religious instruction were segregated by school authorities according to their faiths."

Of course, segregation according to religious affiliation is an objectionable practice in the public schools and is a factor specifically noted as significant by Mr. Justice Frankfurter. Appellants, under their allegation of divisiveness (R. 21), were prepared to show on trial that in fact children in New York are segregated in public school buildings and on public school grounds according to their religions, and that Protestant, Catholic and Jewish children form separate lines and groups in the public school building before or upon marching out and going to religious schools. If this segregation is established, it will be clear that the New York plan incorporates one of the most well-recognized objections to released time systems.

The court below recognized that compulsion by public school authorities on children to participate is constitutionally significant, as noted in Mr. Justice Frankfurter's opinion; yet it held without taking evidence that no compulsion exists in connection with the operation of the New York program (R. 116-117). Appellants, however, allege that, in fact, the "operation of the released time program has resulted * * * in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction" (R. 20). A trial is the only method of determining which of these allegations corresponds with the facts.

The court below held that the New York program differs from the Champaign system in that there is no promotion or publicizing of the released time program by school officials (R. 116-117). This finding, obviously, is of constitutional significance and appellants, under the allegation of pressure and coercion (R. 20), were prepared to

show upon trial that in fact announcements are made and the program is promoted by public school authorities in the public school. This proof cannot be foreclosed simply by finding the contrary.

Solicitation or recruitment of pupils for religious instruction by school officials is recognized by the court below to be a material fact in determining constitutionality. It declared that this practice is not engaged in in New York (R. 116). But there is no evidence to support such a declaration and, in fact, under their allegation of pressure and coercion (R. 20), appellants were prepared to show upon trial that such solicitation and recruitment is a frequent, if not common, practice and has been such for the entire period during which the released time system has been in operation in New York.

The New York courts distinguished the New York program from the Champaign plan by finding, again without evidence, that under the New York Plan non-attending pupils stay in their regular classrooms continuing significant educational work (R. 91). This statement is inconsistent with the actual situation prevailing in New York. Appellants were prepared to show upon trial under allegations in the petition (R. 20-21) that in the overwhelming majority of cases no significant educational work is engaged in during the released time period and that, even when such work is done, it must be repeated since, if it is "significant" and not merely "busy" work, the released children cannot be deprived of it.

The courts below found that no registration cards are distributed by the school (R. 116). Appellants were prepared to show upon trial, under the allegations of the petition (R. 20-21), that distribution of cards by public school teachers and principals is a frequent practice.

According to the court below no public moneys are used (R. 117). However, the petition herein alleges that administration of the released time system "entails use of the public school machinery and time of public school principals, teachers and administrative staff" (R. 20). This is, obviously, a constitutionally material allegation of fact. Under this allegation, appellants were prepared to show upon trial that the released time program is an administrative and economic burden and results in the expenditure of substantial moneys by the public school system. This allegation can be proved or disproved only upon a trial.

Since a petition in a proceeding under Article 78 of the New York Civil Practice Act is in effect a complaint and is governed by the rules applicable to an ordinary pleading, appellants alleged only ultimate facts in their petition and avoided the pleading of evidence. New York Civil Practice Act §§1206, 241. Special Term assumed, wholly without basis, that appellants could not produce evidence to support these ultimate factual allegations. Appellants accordingly made a motion for reargument in which they submitted affidavits by numerous witnesses who were ready to testify in court to evidentiary facts in support of these allegations.[56] The motion for reargument was denied and since, under New York practice, the order thereon is non-appealable, these affidavits are not part of this record on appeal. Nevertheless, this Court can take notice from the published opinion thereon that such a motion was made and that it was supported by affidavits presenting evidence to support the allegations of ultimate fact contained in the petition.

In his opinion thereon Special Term Justice DiGiovanna stated (124 *New York Law Journal*, August 23, 1950 col.

[56] *Zorach et al.* v. *Clauson et al.*, New York Supreme Court, Kings County, Kings County Clerk's No. 10327/1948.

5, p. 299; not off. rep.; printed in the Statement as to Jurisdiction herein, pp. 70-1):

> "Matter of Zorach (Clauson)—This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the 'released time' program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits. Reargument is sought on two grounds.
>
> * * * * * * *
>
> The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a *former* principal, four affidavits of *former* teachers, three affidavits from parents and three from former pupils. These affidavits outline what might be termed administrative difficulties."

Quite aside from the affidavits submitted in support of the motion for reargument, the courts below erred in not giving full weight to the factual allegations of the petition which, on an attack for legal insufficiency, must be deemed to be true.

C. The Constitutional Function of a Trial in This Case

Mr. Justice Frankfurter's concurring opinion in the *McCollum* case is itself the clearest authority for withholding judicial approval of any so-called "released time" plan, not constitutionally objectionable on its face, until the manner in which it actually operates is examined, upon being put in issue. His opinion was based on a record made up at a trial, not on pleadings. He stressed the

importance of a "detailed analysis of the facts" 333 U. S. 203, 226.

The facts presented to the Supreme Court in the *McCollum* case would have been quite different if, as here, no hearing had been held and the pleadings of respondent school officials had been accepted as true without reference to the petitioner's case. For example, the constitutionally significant fact that the administration of the program involved expenditure of state funds was denied by the Champaign school officials and was established only after trial (transcript in the *McCollum* case, p. 52).

In discussing the necessity of a full exploration of the facts, Mr. Justice Frankfurter listed in a footnote some of the fact elements which he deemed necessary to explore in determining the validity of a released time plan:

> "Respects in which programs differ include, for example, the amount of supervision by the public school of attendance and performance in the religious class, of the course of study, of the selection of teachers; methods of enrollment and dismissal from the secular classes; the amount of school time devoted to operation of the program; the extent to which school property and administrative machinery are involved; the effect on the public school program of the introduction of 'released time'; the proportion of students who seek to be excused; the effect of the program on non-participants; the amount and nature of the publicity for the program in the public schools" 333 U. S. 203, 225, note 17.

With respect to almost all of these elements, appellants are prepared to present evidence supporting their claim of unconstitutionality. Yet the courts below prevented the production of this evidence and took the self-contradictory course of (1) resolving all the issues with respect

to these elements unfavorably to appellants and (2) holding that appellants' evidence on the same points was irrelevant.

It is, we submit, no answer to say, as did the Court of Appeals (R. 122), that appellants' allegations, or "a great many of" them, "are conclusory in character" and * * * have been lifted bodily from portions of the *McCollum* opinions" (which, we suggest, is hardly surprising in view of our contention that the two cases are not factually distinguishable). Judge Fuld found the allegations of the petition to be sufficiently well pleaded to withstand a motion to dismiss for insufficiency (R. 140-141). Certainly, there is nothing conclusory about an allegation, to cite one example, that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction" (R. 19, 141), particularly under the New York rule which requires liberality in favor of a pleading on a motion to dismiss for insufficiency. *Dyer* v. *Broadway Central Bank*, 252 N. Y. 430, 432 (1930).

But even if the allegations are "conclusory" and not well pleaded, the remedy is not dismissal on the merits, but a direction to amend (New York Civil Practice Act §105). By refusing permission to amend, the New York courts have held that so long as the enabling statute is constitutionally unobjectionable, it matters not what the administrative officials do by virtue of the power conferred upon them by the statute. This, we submit, is erroneous under the decisions of this Court.

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[37] The court, however, did not identify which allegations it so regarded or say that they were "conclusions of law". Cf. *Matter of Hines* v. *State Board of Parole*, 293 N. Y. 254, 258 (1944).

While we contend that both the program as it might operate under the regulations and the program as it does in fact operate are unconstitutional, it is nevertheless true that the latter may be invalid even if the former violates no constitutional prohibition. The principals, teachers and clerks who administer the public school system act under "color of law" and are agents of the state no less than the Commissioner of Education and Boards of Education who promulgate regulations. Conduct of state employees constitutes state action within the restrictions of the Fourteenth Amendment even if it is unauthorized by statute or regulation, or indeed, even if it is expressly prohibited by statute or regulation. *United States* v. *Classic*, 313 U. S. 299 (1941); *Screws* v. *United States*, 325 U. S. 91 (1945). As this Court said in the *Classic* case:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is 'action taken 'under color of' state law" 313 U. S. 299, 308.

Constitutionality, we submit is determined not alone by what is said, but also by what is done.

It is no answer to say that if the superintendents, principals, teachers and other officials entrusted with enforcement of the statute and regulations violate them, the remedy is "the initiation of disciplinary proceedings against any of the offending teachers or principals" (R. 122). Appellants were not relying here on isolated, occasional incidents which are properly the subject of administrative discipline. The theory of the petition is not only that coercion, divisiveness, etc. "have resulted" from the operation of the program, but that they "inevitably will result" therefrom and are inherent therein (R. 20-21).

It is for this reason that appellants did not allege in their petition specific instances to support their allegations

of so-called "abuses", which really are inherent in the released time program (although Special Term's erroneous decision compelled appellants to set forth evidence of some of these instances in their affidavits supporting the motion for reargument). Appellants claim that these "abuses" are inherent in the system and that on the basis of evidence to be presented on trial the court must find that operation of the program without incurring these "abuses" is impossible (Cf. cases upholding injunction against all picketing where widespread violations and outbreaks lead to the conclusion that peaceful picketing in the particular dispute is impossible as a practical matter. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287 (1941); *Busch Jewelry Co.* v. *United Retail Employees' Union*, 281 N. Y. 150 (1939).)

Illustrative of the point we are making is the practice of public school principals and teachers of questioning children or parents of children who absent themselves from released time classes. Under the set of regulations promulgated by respondents, the public school assumes no responsibility for attendance at the church center and principals and teachers may not comment thereon (R. 17-18). Yet, the Public Education Association in a survey conducted in 1942 found that in 16 out of 82 schools visited this regulation was *admittedly* not followed. The results of this survey were made public and unquestionably came to the attention of respondents. Nevertheless, in a follow-up survey made in 1943, the number of schools admittedly not following this regulation had increased to 25 out of 89. Again the results were made public and again a follow-up survey was made in 1945. In this survey, the number of schools admittedly not following the regulation had increased to 33 out of 88 (Public Education Association, Released Time for Religious Education in New York City's Schools, June 30, 1945, p. 7). Had appellants been allowed to present their evidence, they would have shown that the number of violations had again

increased. Such evidence, we submit, must lead to the conclusion that, as a matter of law and of fact, the present released time program as actually practiced in New York necessarily and inevitably entails widespread violations of constitutional prohibitions.

Appellants have exhausted their administrative remedy by demanding of respondents that they discontinue the released time program. Demands for elimination of particular unconstitutional acts cannot provide a solution. Even if the particular teacher or principal involved in such an act were disciplined and that specific act discontinued in the particular school, it would have little or no effect upon what we contend is the widespread and inevitable unconstitutional administration of the program. Appellants' contention is that unconstitutional conduct constitutes the warp and woof of the released time program and that it would not alter the basic unconstitutional pattern if we were "to draw a thread from a fabric." Mr. Justice Frankfurter's opinion, 333 U. S. 203, 231.

Conclusion

The decision below, we submit, is erroneous and self-contradictory. On the one hand, it asserts that the New York system was not affected by the *McCollum* decision because the New York system differs materially from the Champaign system. At the same time, it refuses to direct a trial on which it could be established that the New York system does not differ materially from the Champaign system. Appellants claim that as a matter of *law* the New York system as authorized by the statute and respondents' regulations was invalidated by the *McCollum* decision. They claim also that, at the very least, this Court should direct a trial so that it could be established whether, as a matter of fact, the New York system as actually operated, inevitably violates constitutional restrictions.

Appellants urge, first, that the statute and regulations show on their face and as a matter of law that the re-

leased time plan which they authorize is unconstitutional (and that would be true, also as to the released time practices admitted by respondents). This is an issue not involving controverted facts, which can be decided on the pleadings and papers annexed. If that first point is not sustained, appellants urge, second, that, the New York released time plan in its actual and inevitable operation is unconstitutional. Such an issue, we submit, cannot be decided for or against appellants or appellees without a trial. A final order can thus be granted for appellants on the first point, without reaching the second point and, hence, without a trial. But a final order cannot be given against appellants without deciding both points against them; this requires a trial as to the second point.

Appellants urge that the decision below should be reversed on the ground that the New York released time plan, on the admitted facts, is unconstitutional or, if the Court does not so find, on the ground that the court below erred in failing to permit appellants to prove the contested allegations of their petition.

Today, renewed pressures are being exerted by some, in education and elsewhere, to break down the historic American principle of complete separation of Church and State—to put into the wall of separation a gate here and an opening there. For the good of state and religion, this principle must be maintained firmly and clearly, and must not become entangled in corrosive precedents, sought to be created, one at a time, in the shape of a claimed "exception" to the principle.

Respectfully submitted,

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January 1952.

APPENDIX

Relevant Provisions of New York Education Law, Art. 65, Part I, "Compulsory Education"

(16 McKinney's Consolidated Laws of New York, Part 1, at pp. 743 et seq.; Sections 3204, 3205, 3210, 3211, 3212 and 3228)

§3204. Instruction required.

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

§3205. Attendance of minors upon full time day instruction.

1. In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction.

3. In each city of the state and in union free school districts having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction.

§3210. Amount and character of required attendance

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules

and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

§3211. Records of attendance upon instruction.

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction shall keep an accurate record of the attendance and absence of such minor. Such record shall show the name, date of birth, name of person in parental relation to the minor, and his latest place of residence. It shall also show his attendance, each day, by the year, month, day of the month and day of the week and hours of the day, and the number of hours of attendance in each day thereof.

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3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

§3212. Definition of persons in parental relation and their duties; duties of certain minors and other persons.

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2. Duties of persons in parental relation. Every person in parental relation to a minor included by the provisions of part one of this article:

a. Shall submit at the time such minor begins to attend upon instruction evidence of age as required for the issuance of an employment certificate, or show that such evidence cannot be produced.

b. Shall cause such minor to attend upon instruction as hereinbefore required, and to comply with the provisions of part one of this article with respect to the employment or occupation of minors in any business or service whatever.

. . . . . .

d. Shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending.

§3228. Penalties.

Except as otherwise provided, a violation of part one of this article shall be punishable for the first offense by a fine not exceeding ten dollars, or ten days' imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.